Filed 12/18/15 P. v. Lopez CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANTONIO LUIS LOPEZ, Defendant and Appellant.	E063813 (Super.Ct.No. RIF1300897) OPINION

APPEAL from the Superior Court of San Bernardino County. Charles J. Koosed, Judge. Affirmed.

William D. Farber, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Antonio Luis Lopez of a total of eight counts of making terrorist threats against his wife and children, one count of assault with a deadly weapon, and two counts of felony child endangerment. He was sentenced to a total state prison term of eight years eight months. In *People v. Lopez* (Feb. 27, 2015, E059963) (nonpub. opn.), we reversed the felony child endangerment convictions based on instructional error but otherwise affirmed the judgment. We remanded the case for retrial on the endangerment convictions, or resentencing if the People chose to reduce the felony child endangerment charges to misdemeanors.

Upon remand, defendant's counsel waived defendant's presence. The People made a motion to reduce the felony child endangerment counts to misdemeanors. The trial court then resentenced defendant to a total sentence of eight years eight months.

Defendant makes one claim on appeal that the trial court erred on resentencing him on all counts after remand, in his absence and without a personal waiver of his presence for resentencing. We find the trial court erred by accepting counsel's waiver of defendant's presence without a personal waiver. However, we find such error was harmless beyond a reasonable doubt and affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. PRIOR PROCEEDINGS[1]

Defendant pretended to have a gun and threatened to shoot his wife and children. He then held a knife to his wife's neck in the presence of his three children and

[1] The prior proceedings are taken from our opinion in case No. E059963, *ante*.

threatened to kill them. Defendant was found guilty by a Riverside County Superior Court jury of eight counts of making criminal threats within the meaning of Penal Code section 422[2] as follows: Jane Doe 1, his wife (JD1) (counts 2, 7); Jane Doe 2 (JD2) (counts 3, 8); Jane Doe 3 (JD3) (counts 4, 9); and John Doe (counts 5, 10). It was further found true by the jury as to counts 7 through 10 that defendant personally used a dangerous or deadly weapon, a knife, within the meaning of sections 12022, subdivision (b)(1), and 1192.7, subdivision (c)(23). Defendant was also found guilty of assault with a deadly weapon, a knife, within the meaning of section 245, subdivision (a)(1) against JD1 (count 6); and two counts of felony child endangerment within the meaning of section 273a, subdivision (a), against JD2 (count 11) and JD3 (count 12).

Defendant was sentenced to four years on count 11, the principal term, plus one year four months on count 12. In addition, the defendant was sentenced to consecutive sentences of eight months on count 10; plus four months for the knife-use enhancement; eight months on counts 2 and 5; and one year on count 6. The trial court stayed the sentences on counts 3, 4, 7, 8 and 9. Defendant received a total prison sentence of eight years eight months.

[2] All further statutory references are to the Penal Code unless otherwise indicated.

On appeal, defendant argued that his convictions in counts 11 and 12 should be reversed because the instructions given to the jury omitted an element of the crime. We agreed and remanded for the People either to make a motion to reduce counts 11 and 12 to misdemeanor charges of child endangerment, or retrial on the charges of felony child endangerment.

B. RESENTENCING PROCEEDINGS

The matter was heard on remand on June 2, 2015, in front of the same trial court. Prior to the hearing, the People filed a statement of election to reduce counts 11 and 12 to misdemeanors. The People also argued that the trial court should impose the upper term on the charges, and sentence defendant consecutively on all of the section 422 convictions.

The trial court and the parties discussed the resentencing first in chambers; the discussion was not reported. In open court, the People made its motion pursuant to section 17b to reduce counts 11 and 12 to misdemeanors. Defense counsel then stated that as long as defendant was not going to receive a longer sentence, defendant did not need to be present for resentencing. Defense counsel stated, "I think we can proceed without him." The trial court agreed it was not going to give defendant more time on the resentence. The People had no objection to the resentence.

The trial court stated, "I'll take the matter then without . . . defendant's presence. I believe we can move forward without him being here." The trial court then reduced counts 11 and 12 to misdemeanors. It then concluded it had to resentence on all counts

because count 11 was the principal term at the time of the original sentencing. The trial court vacated the sentence.

Defendant's counsel made a brief statement that, "Your Honor, based on our discussion in chambers, it seems as though the Court and counsel, we all have a similar and accurate recollection based on the remittitur how the trial went down, what evidence was presented, how the facts played out. And based on that, your Honor, I would submit to the Court." The People noted it was arguing for the upper term, but it accepted that the trial court felt the middle term was appropriate. The trial court stated it had reviewed the sentencing brief filed by the People, reviewed the probation report, and the minutes of the sentencing.

The trial court made count 6 (assault with a deadly weapon against JD1) the principal term and imposed the midterm of three years. For counts 2, 3, 4, 5, 8, 9, and 10, the section 422 convictions against JD2, JD3 and John Doe, the trial court imposed one-third the midterm on those counts (eight months). Counts 8, 9 and 10 included four-month sentences for the knife-use enhancement. The trial court explained it had stayed counts 3, 4, 7, 8 and 9 at the original sentencing because it had imposed sentence on the felony child endangerment convictions. The trial court recalled that there were two distinct terrorist threats against JD2 and JD3, and John Doe, one involving defendant claiming to have a gun, and then when he held a knife to JD1's throat and threatened to kill everyone. Counts 7 (the section 422 conviction involving his wife), 11 and 12 were stayed.

The trial court commented, "That brings the total aggregate sentence to eight years, eight months, which happens to be what he got initially. I wasn't trying to match the number again. That's just how the math worked out."

DISCUSSION

A. PERSONAL PRESENCE AT RESTENCING

Defendant contends that the trial court violated his federal constitutional rights to due process and under the confrontation clause by failing to have him personally waive his right to be present at the resentencing hearing. The People concede the error but contend it was harmless beyond a reasonable doubt.

A defendant has federal and state constitutional rights to be present at a sentencing hearing unless the right to appear has been expressly or impliedly waived. (*People v. Hines* (1997) 15 Cal.4th 997, 1038-1039; see also *People v. Superior Court* (*Kaulick*) 215 Cal.App.4th 1279, 1299 [defendant has right to be present at resentencing].) Further, section 977, subdivision (b)(1) provides that a defendant be personally present at the time of the imposition of sentence. Here, counsel for defendant waived his presence. However, there was no indication that defendant had consented to such waiver. Since there is "scant evidence of consent, and even less evidence that defendant understood the right he was waiving and the consequences of his waiver," the trial court erred by conducting the resentencing in his absence. (*People v. Davis* (2005) 36 Cal.4th 510, 532.)

"In general, 'the defendant's absence from various court proceedings, "even without waiver, may be declared nonprejudicial in situations where his presence does not bear a 'reasonably substantial relation to the fullness of his opportunity to defend against the charge.'"'" (*People v. Dennis* (1998) 17 Cal.4th 468, 538; see also *People v. Ayala* (2000) 23 Cal.4th 225, 288, fn. 8.) "The defendant must show that any violation of this right resulted in prejudice or violated the defendant's right to a fair and impartial trial." (*People v. Hines*, *supra*, 15 Cal.4th at p. 1039.) Error pertaining to a defendant's presence is evaluated under the harmless beyond a reasonable doubt standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 23. (*People v. Davis*, *supra*, 36 Cal.4th at p. 532.)

Initially, the trial court properly resentenced defendant on all the charges. In our opinion, we stated that if the People chose to reduce counts 11 and 12 to misdemeanors, defendant would need to be "resentenced." Since count 11 was the principal term, the trial court had to resentence defendant. The trial court also properly imposed consecutive sentences on the section 422 convictions; defendant does not contend that the sentence was improper.

Defendant's presence would not have made a difference in the sentence. Initially, the trial court rejected that the upper term for count 6 was proper and imposed the midterm. Further, this court already concluded that the terrorist threats were separate. We found the acts were not all part of a continuous course of conduct and found that defendant was properly convicted of multiple counts. We also rejected an argument that defendant was improperly sentenced on both of the terrorist threat counts against John

Doe. Simply put, there was nothing that defendant could have argued had he been present at the sentencing hearing. Defendant has failed to show that he was prejudiced by being absent from the resentencing.

DISPOSITION

We affirm the judgment.

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MILLER
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.